IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7113 of 1992

with

SPECIAL CIVIL APPLICATIONS No.305 and 476 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : YES

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ISHWARBHAI NAROTTAMBHAI PATEL

Versus

K H TRIVEDI

Appearance:

1. Special Civil Application No. 7113 of 1992
   MR KG VAKHARIA for Petitioner No. 1
   MR TUSHAR MEHTA for Petitioner No. 1
   MR BR SHAH for Respondent No. 1,2,3
   MR UR GANDHI for Respondent No. 2
2. Special Civil Application No. 476 of 1993
   MR BS PATEL for Petitioner No. 1
   RULE SERVED for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 16/08/2002

COMMON ORAL JUDGEMENT

1. In Special Civil Applications No.305 of 1993 and No.7113 of 1992 there is a common order and the facts of Special Civil Application No.476 of 1993 is inter-connected and the inquiry was common and, therefore, all these petitions are being dealt with together by common judgement.

2. The short facts of the case are that the petitioners were members of the Executive Committee of Shri Khedut Sahkari Khand Udyog Mandali Ltd., which is respondent No.2 herein and which is a registered cooperative society under the Gujarat State Cooperative Societies Act (hereinafter referred to as the "Act"). The society had initially invited offer for supply of certain machinery for its sugar factory and ultimately the contract on turn-key basis was granted to one Bardoli Engineering Works as per the resolution dated 22-5-19984 for the amount of Rs.13,74,000/- (Rupees thirteen lacs seventy-four thousand only). In the order, it was specifically mentioned that the amount of tax and erection charges are included. It is the case of the petitioner that after the issuance of the aforesaid order there was change in the design and, therefore, certain machinery was additionally required to be installed and the same was actually installed by the aforesaid Bardoli Engineering Works and because of the same, the said Bardoli Engineering Works had issued a bill of Rs.45,51,090.86. The aforesaid bill was considered by the Executive Committee of the Society and an amount of Rs.23,41,000/- (Rupees twenty-three lacs fourty-one thousand only) was sanctioned as against the initial contract of Rs.13,74,000/-.

3. The aforesaid resulted into an audit and ultimately an inquiry under Section 93 of the Act was ordered by the Director of Sugar, Gandhinagar as per the order dated 27-12-1989, and the period of inquiry was from 1-10-1984 to 30-9-1986. Initially Shri K.P.Pandya, District Registrar, Cooperative Societies (Sugar) at Surat was appointed as the Inquiry Officer and thereafter, since he was transferred, the charge was given to one Shri R.G.Pandya. Thereafter, Shri R.G.Pandya did not complete the inquiry and ultimately as per the order dated 12-12-1990 issued by the Director of Sugar one Shri K.H.Trivedi was appointed as the Inquiry

Officer. It is the case of the petitioners that the earlier Inquiry Officer, Shri Pandya was of the view that the liability could not be fixed upon the office bearers and, therefore, they did not proceed with the inquiry. However, there is no material on record to show the said aspect except the bare averments and submissions made by the petitioners.

4. The Inquiry Officer, Shri Trivedi ultimately held the inquiry and found that all the petitioners are liable for making payment of Rs.36,250/- each to the society together with one Vasanji G. Patel, who was also member of the Executive Committee and in all the liability is fixed to Rs.1,45,000/- and one Dilip S. Bhavsar was fastened with the liability of Rs.10,08,504.

5. The appeal No.234/1991 was preferred by the Dilip S. Bhavsar, whereas appeals No.235/1991 to 237/1991 were preferred by the petitioners and V.G.Patel. The petitioner of SCA No.476/1993 preferred appeal No.32/1992. All these appeals were heard before the Gujarat State Cooperative Tribunal at Ahmedabad. The learned Tribunal ultimately passed the common judgement and order dated 25-9-1992, whereby appeal No.234/1991 preferred by Dilip S. Bhavsar, who was the Purchase Officer was allowed with the further direction by remanding the matter to the Inquiry Officer to re-inquire into the same case. The Tribunal, prima facie, observed that the conduct of the Managing Committee is also required to be inquired into and examined. However, so far as the appeals No.235/1991 to 237/1991 qua the petitioners of SCA No.305/1993 and 7113/1992 and one Mr.Vasanjibhai are concerned, the appeals were not accepted and the same were dismissed. The said judgement and award of the Tribunal is challenged by the petitioner of SCA No.305/1993, so far as it relates to the appeal No.237/1991. The petitioner of SCA No.7113/1992 has challenged the judgement and award of the Tribunal, so far as it relates to the appeal No.236/1991. As per the statement made at the bar, Shri V.G.Patel, who was the appellant in Appeal No.235/1991 has not challenged the said judgement and award of the Tribunal.

6. The petitioners of SCA 476/1993, as stated above, had preferred an appeal which was numbered as Unreg. Case of 32/1992 before the Cooperative Tribunal, came to be dismissed by the Tribunal on the ground that the certified copy of the order which is under challenge is not produced. The aforesaid dismissal order came to be passed on 13-11-1992 and the petitioners had challenged

the said order before this Court in this petition.

7. When the matter came up for final hearing, it was put to Mr.B.S.Patel, learned Counsel for the petitioners in SCA No.476/1993 that would the petitioners insist for remand of the matter or would the petitioners have any objection if the matter is examined on merits at par with the case of the other petitioners namely the petitioners of SCA No.7113/1992 and SCA No.305/1993. At this stage, Mr.B.S.Patel has fairly submitted that if the case of the other petitioners is examined on merits and if this matter is remanded to the Tribunal, his clients will have the same effect, because the Tribunal will not be taking any contrary view and,therefore, he submitted that instead of remanding the matter, the case of the petitioners of SCA No.476/1993 may also be examined on merits and the matter be considered accordingly at par with the other petitioners and hence Mr.Patel has also addressed the case on merits for assailing the order passed by the Tribunal for confirming liability upon his clients by the Inquiry Officer.

8. Mr.K.G.Vakharia, learned Sr. Counsel appearing with Mr.Ketan Shah and Mr.Tushar Mehta mainly raised the contentions that the inquiry is beyond the scope of the order for holding inquiry in as much as, in his submission, the inquiry was to be held in the affairs of the respondent society for the period from 1-10-1984 to 30-9-1986 and, in his submission, the resolution in question is dated 20th October, 1986 and, therefore, he submitted that the Inquiry Officer could not have inquired into the said aspects and fastening of the liability is without jurisdiction. Mr.Vakharia also submitted that there was no charge regarding the subject matter of the resolution dated 20th October, 1986 and he submitted that since there was no charge, the Inquiry Officer has fastened the liability without giving appropriate opportunity. Mr.Vakharia lastly submitted that in any case the decision is taken by the Executive Committee in its meeting dated 20th October, 1986 keeping in view the consideration that the machinery which is supplied by Bardoli Engineering Works is of a very good quality and on account of the installation of he machinery, the society has earned huge profit and, therefore, keeping in view the said aspect it was decided by the Executive Committee in exercising its wisdom that the amount of Rs.1,45,000/- should be condoned. Mr.Vakharia submitted that there is no allegation regarding malice or any benefit procured by the petitioners from the said decision and he submitted that at the most the same can be the error of judgement.

Mr.Vakharia submitted that in a matter of error of judgement the liability cannot be fastened under Section 93 of the Act. Mr.Vakharia also relied upon the judgement in the case of "Shankarbhai Devjibhai Patel and Others Vs. Sabarkantha Jilla Sahakari Kharid Vechan Sangh Ltd. and Others", reported in 1984 GLH, 498. Mr.Vakharia also declared upon instructions from his clients that when this Court admitted the matter interim relief against disqualification under Rule 32 was granted on condition to deposit the amount of Rs.36,250/- by each of the petitioners and he submitted that the amount is accordingly deposited and the petitioners are not insisting for the refund of the amount and, therefore, he submitted that when the society has also recovered the money or in any case now there is no loss to the society on account of non-claiming of the amount by the petitioners and the only question which would require consideration of the Court is the disqualification and he submitted that since the liability if maintained under Section 93 of the Act, would attract a permanent disqualification to the petitioners and he submitted that the matter may be disposed of by observing that the amount is already recovered and, therefore, the disqualification will not be attached to the petitioners. Mr.Vakharia relied upon the unreported judgement by this Court dated 25-9-2001 in SCA No.478 of 1991 to contend that such a cource can be adopted by the Court. Mr.Vakharia also made an attempt to challenge the validity of Section 93, contending that there are already averments regarding challenge to the constitutional validity of Section 93, but Mr.Vakharia fairly submitted that there is no prayer for challenge to constitutional validity of Section 93. He submitted that if the Court is not inclined to accept the contention regarding the attachment of the permanent disqualification under Rule 32 read with Section 93 or if the Court finds that the error of judgement or in the matter of administration the liability can also be fixed under Section 93, then the petitioners would like to amend the petition by adding the prayers for challenging the constitutional validity of Section 93 of the Act.

9. It may be stated that the petitions were filed in 1993 and at the time when the petitions were filed the petitioners chose not to challenge the validity of Section 93 of the Act and even thereafter the matter remained pending for a period of about 10 years before this Court and the petitioners had chosen not to challenge the validity of Section 93 of the Act and, therefore, on the fag end of the hearing when such a request for amendment in the prayer clause to challenge

the validity of Section 93 of the Act was suggested, I found such type of amendment could not be said to be with bonafide purpose and, therefore, such request which was in any case made by Mr.Vakharia was not accepted, more particularly when the matter was already heard and it was at the fag end of the hearing. It is also required to be noted that litigants who chose the forum knowing very well that if there is no prayer to challenge the constitutional validity of any statutory Act, it will be listed before "A" Bench and if the prayer is for challenging the constitutional validity it may be listed before a different bench as per the High Court rules. Once the decision is taken by the particular litigants not to challenge the constitutional validity of a particular statute being satisfied with the challenge to the order, and when the matter is at the fag end of the final hearing stage, more particularly after a period of about 10 years and when the petitioners having taken benefit of the order of admission and of the interim relief for a period of about 10 years, and if the amendment is allowed to be made, it will result into transferring the matter to a different Bench, therefore, in my view, such practice, if encouraged, would result into not only delay, but it would be unfair on the part of the litigants to request the Court for such purpose and, if such requests are granted it would result into encouraging unfair practice by the litigant and hence for the aforesaid reasons I have not accepted the request made by Mr.Vakharia.

10. Mr.B.S.Patel, learned Counsel appearing for the petitioners in SCA No.476/1993 has mainly adopted the contentions raised by Mr.Vakharia. However, in addition that too, he has submitted that the bonafide of the petitioners is very clear in as much as even before preferring the appeal, without prejudice to the rights and contentions, petitioner has already deposited an amount of Rs.36,250/- before the society by taking moral stand and he submitted that the petitioner of SCA No.476/1993 is not desirous to claim the refund of the said amount and, therefore, if the society has been able to recover the amount, the order under Section 93 of the Act may not be maintained by the Court, which is likely to attach a permanent disqualification under Rule 32. Mr.Patel submitted that as per the Scheme of the Act, Section 93 proceedings is not the only remedy, but there are other remedies provided under Section 96 also for recovering the amount by the society. In the present case, since Section 93 is resorted to, he submits that it will attach a permanent disqualification. Otherwise also, in his submission, even Section 93 proceedings

could not have been resorted to. Mr.Patel relied upon the judgement of this Court in the case of "Sardar Kheti Vishyak Vividh Karyakari Sahakari Mandli Ltd. (In Liq.) v. Natverlal K. Shah & Ors.", reported in 1979(2) GLR, 626 to contend that proceedings under Sections 96 and 93 are in alternative and, therefore, once a proceedings is taken under Section 93, it can also be taken under Section 96, and at the end in any case it cannot attach the disqualification under Rule 32 permanently to the person concerned so as to make him disqualified for becoming the member of the Managing Committee of any cooperative society.

11. On behalf of the State Government and the authority, Ms.Devani, learned AGP has submitted that the petitioners when appeared before the Inquiry Officer have not raised the contentions regarding the inquiry being beyond its scope. Therefore, she submitted that such contentions have not been raised by the petitioners and the petitioners have rather surrendered to the jurisdiction of the Inquiry Officer and, therefore, on the principles of acquiescence, now the petitioners cannot be allowed to raise such contentions. Ms. Devani has also submitted that Section 93 would apply not only in a matter of misfeasance or misappropriation of funds, but also in a matter when the office bearers of the Society make themselves accountable for any transaction and, in her submission, if the Inquiry Officer finds that there is no proper utilisation of the funds or proper steps for recovery of any debt of the society, the same would also fall within the scope and ambit of Section 93 of the Act. Therefore, she submitted that the order passed by the Tribunal is legal and valid and in any case there is no justification on the part of the petitioners to contend that the amount of Rs.1,45,000/- is already recovered by the society, which otherwise was to be recovered as the excess payment and, therefore, fastening of the liability by the Inquiry Officer and its confirmation thereof by the Tribunal is legal and valid.

12. Before I proceed to examine the contentions raised by both the sides, it is required to be clarified that the order passed by the Tribunal is a common order in the appeal No.234/1991, which was preferred by Mr.Dilip Bhavsar and also in the appeal No.235/1991 preferred by the petitioners. So far as the appeal No.234/1991 and its reasonings are concerned, the same are not much relevant since the Tribunal has remanded the matter for a fresh enquiry and the matter is pending at this stage. A statement is made by Ms.Devani at the bar that thereafter the Inquiry Officer has, after remand,

concluded the inquiry and has reduced the liability of Mr.Bhavsar too. In any case in the said enquiry the petitioners have not been held responsible since it was not entertained pursuant to the order passed by the Tribunal and, therefore, the observations made by the Tribunal, in my view, will have to be segregated from the facts of the appeal No.234/1991 and this Court is concerned with the facts of the Appeal No.235/1991 to 237/1991 and un-registered case No.32/1992.

13. On examination of the first contention of Mr.Vakharia regarding holding of enquiry beyond the scope and ambit, it appears that the transaction for purchase of machinery cannot be isolated as sought to be canvassed by Mr.Vakharia. The order was issued on 24-5-1984 and thereafter as per the various terms and conditions of the order the transactions were to be proceeded further. The bill has been received by the society on 23-5-1985 and ultimately on 31-1-1986 it was decided to issue the debit note and the debit note was actually sent. Instead of recovering the amount as per the debit note, the decision was taken of condoning the amount in the meeting dated 20th October, 1986. Since the transaction is a continuous and connected by various events pursuant to the transaction which is entered into by the Society and the Bardoli Engineering Works, it cannot be segregated as sought to be canvassed by Mr.Vakharia and, in my view, merely because the decision is taken of condoning the said amount on 20th October, 1986, it cannot be said that the Inquiry Officer had no authority or jurisdiction to inquire about the same, more particularly when it relates to the debit note which has been issued on 31-1-1986 i.e. during the period which falls between the period from 1-10-1984 to 30-9-1986. That apart, the petitioners have not raised any of such contentions, neither before the Inquiry Officer, nor even before the Tribunal in the appeal. Even in the memo of petition such contention is not raised, but even if it is stated in the memo of the petition or submitted earlier before this Court, the petitioners cannot be allowed to raise such contention which is rather a mixed contention of facts. It is well settled that when a petition is filed under Article 227 of the Constitution of India or even if it is Article 226 of the Constitution of India, arising from the order passed by the statutory Tribunal in appeal, petitioners cannot be allowed to raise contention on the question of jurisdiction if not raised before the first authority. In the present case, the said contention has not been raised before the appellate authority of the Gujarat State Coop. Tribunal also and, therefore, the petitioners cannot be allowed to raise the contention

regarding the jurisdiction of the Inquiry Officer. Moreover, Ms.Devani is right in submitting that the petitioners have rather surrendered to the jurisdiction of the Inquiry Officer and on the principles of acquiescence also, the petitioners cannot be allowed to raise the contention regarding the jurisdiction of the authority and, therefore, the contention regarding the jurisdiction of the Inquiry Officer fails and hence rejected.

14. The second contention raised by Mr.Vakharia on the ground that there was no charge is also more or less on the same line as the contention of jurisdiction. The perusal of the order passed by the Inquiry Officer shows that any such contention was not raised. However, Mr.Vakharia submitted that when there was no charge, there was no occasion for the petitioners to raise such defence and hence the same would not be reflected in the order. Even if such is the situation, then also the petitioners could have raised such contention before the Tribunal, but the perusal of the order passed by the tribunal shows that no such contention was raised. Mr.Vakharia has not been able to show anything regarding such contention or dealing of such contention by the Tribunal in the order. Of course, Mr.Vakharia has tried to show the copy of the charge-sheet issued to the petitioners by the Inquiry Officer. The perusal of the charge-sheet shows that the inquiry was pertaining to the whole transaction with Bardoli Engineering Works, the surplus payment made and non-recovery of the same. One of the items in the charge-sheet itself is of Rs.42,504/for non-authorised payment of the sales-tax amount which is forming part of the liability, which is condoned by the Executive Committee of the Society and, therefore, it cannot be said that the Inquiry Officer has fastened the liability for which there was absolutely no basis and nothing was found. The said question regarding the nonexistence of the charge is a mixed question of law and facts, which the petitioners cannot be allowed to raise at this stage under Article 227 of the Constitution of India, more particularly when such contention is not even raised by the petitioners before the Tribunal and, therefore, the second contention of Mr.Vakharia also fails and hence rejected.

15. The last contention of Mr.Vakharia, prima facie, appears to be attractive, but upon detailed scrutiny for the reasons stated hereinafter, in my view, cannot be sustained. It is true that when it is a matter of error of judgement or when two views are possible, the office bearers of the society may be justified in taking the

stand that it is purely an administrative decision and, therefore, the liability cannot be fastened under Section 93 of the Act even on the ground of misapplication or accountability to the funds of the society. However, in the facts of the present case it is apparent that there is a concurrent finding of two authorities below namely, Inquiry Officer as well as the Tribunal that there was absolutely no justification on the part of the members of the Managing Committee to condone the amount of Rs.1,45,000/- when the society had earlier already taken decision to recover the same by issuing the debit note dated 31-1-1986. Mr.Vakharia made attempt to contend that since the machinery which was supplied was of a good quality and since the society earned huge profit out of the utilisation of the said machinery, by showing grace the office bearers of the society have condoned the said amount. Mr.Vakharia for the said purpose has produced the resolution dated 20th October, 1986 to show the decision taken on the part of the members of the Executive Committee of the society. The same also cannot be accepted because when the society had placed the order, it was the duty of the suppliers namely, Bardoli Engineering Works to supply good and genuine machinery and, therefore, merely because a supplier has supplied a genuine and good quality machinery can hardly be said to be a ground for condoning the excess payment. Further the earning of profits out of the utilisation of the machinery is always the purpose of investment of the money by the society. The society had placed the order with a view to see that the machinery can be used and profit can be earned therefrom. If the supplier had supplied a genuine and good quality machine and if the society had earned profit by utilising the said machinery, the supplier would be entitled to the legitimate price of the machinery as per the terms and conditions of the purchase agreement. At this stage it would be worthwhile to refer to some of the observations made by this Court in the case of "Varvabhai Nathabhai Rabari Vs State of Gujarat" as per the judgement dated 28-1-2002 in LPA No.8/2002 of the Division Bench. In a matter of supersession of the Market Committee, while dealing with the contentions of the elected body that when two views are possible, it cannot be said that default is committed in performance of duties. While testing the said submission it was observed by the Division Bench at para 9 as under:

" The status of the elected members of the market committee is more or less like the status of other elected members holding the office under the local authorities or statutory authorities.

> It is true that the market committee has been given power to purchase and sell its property, but its power to purchase and sell the properties are coupled with the duty to ensure that such powers are used for enforcement of the objects of the At, rules and bye-laws. These powers are coupled with the public duty and such powers are not like powers of individual persons managing their own affairs but there is something more about the accountability. It is needless to point out that when any representative is elected by the voters, some faith is reposed on such elected representative by the voters that the so elected representative would exercise his powers under statutes for the larger interested of the institution or the local body by acting as a wise person keeping in view the pros and consequences of the action to be taken and keeping in view the interest of institution or the body."

I am of the view that the observations made by the Division Bench were pertaining to the elected body of a market committee in a matter of supersession of a market committee which is a statutory body. I find that the status of the elected members of the society is more or less at par with the elected representative of such market committee or any other elected representative. Perusal of the scheme of the Gujarat Cooperative Societies Act also shows that the principles of accountability is maintained even in the affairs of the administration of cooperative societies. In that view of the matter, I find that there is no reason why such principles should not be applied to the elected representative of the cooperative society also. In the present case, there was absolutely no justification for condoning the amount because the test would be whether any prudent person would allow an amount of Rs.1,45,000/to let go merely because the supplier had supplied a machinery of good quality or merely because he has earned good profit out of it. The normal conduct of any office bearers of the society or even a normal prudent person would insist that the excess payment which is made must be refunded because the price of the machinery which was fixed was for supplying genuine and good quality machinery and investment was with a view to make profit and, therefore, there can be hardly any justification for condoning such amount. The said aspect is coupled with that the fact that on internal page 22 of the judgement of the Tribunal it has been recorded that after the supply of the machinery there were correspondences by the Managing Director as per letter

dated 7-5-1986 that out of the machinery which was supplied by Bardoli Engineering Works one unit of vertical crystallizer has stopped working or rather it has become out of order and it is also communicated that the expenses for repairing of the same will be recovered by the Society. This shows that the contention regarding the good quality of machinery supplied is even factually incorrect. But even if such is the fact then also I do find that there was absolutely no justification on the part of the members of the Executive Committee to condone such amount and, therefore, in that view it cannot be said that two views were possible or there was error of judgement. In my considered opinion the only view possible can be the recovery of money from Bardoli Engineering Works and no prudent or responsible man would have allowed the amount to be condoned. The Tribunal has, therefore, rightly found that there is no jurisdiction for condoning such amount on the part of the members of the Executive Committee and the said contention of Mr.Vakharia that it was only an administrative decision or that two views were possible or there was an error of judgement, which cannot be a ground for inquiry under Section 93 of the Act fails and hence rejected.

16. In the case of "Shankarbhai"(Supra) on page 513 at para 28 this Court, while interpreting Section 93 has observed as under:

> "For holding a person guilty of either misapplication of funds or that of misfeasance, it would be necessary to prove - 1. dishonesty, 2. negligence, meaning thereby, gross or wilful negligence, 3. wanton disregard for the rules and regulations of the Society, 4. misapplication of the funds for the purpose wholly ultra vires the purpose of the Society, and 5. utilisation and/or application of funds in irregular fashion with some ulterior and/or improper motive for achieving some unjust object. Mere irregularity alone is not sufficient. The same should be coupled with ulterior and/or improper motive. The object also should be unjust."

Even if the principles laid down by this Court in the said judgement are considered, then also I am of the view that the present case would be covered by item No.2 and item No.4 namely, 2. negligence, meaning thereby, gross or wilful negligence and 4. misapplication of the funds for the purpose wholly ultra vires the purpose of the

Society. The society fund was not meant for the purpose of giving additional price or award to the supplier of the machinery and it was the duty of the office bearers of the society to recover the surplus money and condoning such amount is a clear case of misapplication of funds for the purpose wholly ultra vires the purpose of the Society and of gross and wilful negligence in not recovering the money.

17. This takes me to the examination of the contention raised by Mr.Patel with regard to the simultaneous remedies under Section 96 and 93 of the Act. The perusal of Section 96 read with Section 97 of the Act shows that if the society has to recover any amount by way of claim, then it is upon to the society to resort to the proceedings under Section 96 of the Act. If there is any admitted debt or claim to be recovered by the society from the office bearers of the society, then possibly Section 96 can also be resorted to. In a matter where the office bearers of the society have set all the claim unauthorisedly or for there being no authority, then the only proceedings competent is under Section 93 and not under Section 96. Proceedings under Section 93 can also be resorted to in a matter where the society can rather not recover the money on account of the conduct of its own office bearers and, therefore, Section 93 would apply in the cases including where (1) when the fund is misapplied (2) is written off (3) any liability or accountability has arisen in the money or the property of the society (4) or any office bearers for guilty of misfeasance or breach of the trust in relation to the society. Therefore, applicability of Section 93 is in a larger field than the proceedings which may be initiated under Section 96 of the Act. It may be that if the amount is already ordered to be recovered under Section 96 of the Act, the Registrar may not initiate the proceedings under Section 93 but thereby it does not mean that the effect of proceedings under Section 93 is to be treated only at par with the proceedings under Section 96 of the Act. In case of "Sardar Kheti Vishyak Vividh Karyakari Sahakari Mandli Ltd. Vs Natverlal K. Shah & Ors." reported in 1979(2) GLR, 626 this Court has observed at para 10, relevant portion of which is reproduced below:

> "10. It is, therefore, evident that the proceedings under Section 93 are judicial proceedings. Once the proceedings under Section 93 of the Act are initiated and concluded, the parallel proceedings under Section 96 of the Gujarat Co-operative Societies Act cannot be

initiated and proceeded with. Though the proceedings under Section 93 of the Act are initiated by the Registrar and the proceedings under Section 96 can be initiated by the Cooperative Society itself, they are for all practical purposes parallel proceedings and the judgement given earlier in one proceedings would bar the second proceedings. The Legislature that has enacted sections 93 and 96 of the Act cannot be credited with a view that it permitted two parallel proceedings even by risking the two conflicting judgements. It is, therefore, inevitable to hold that the proceedings under Section 93 and those under Section 96 are mutually exclusive in the sense that even in judicial proceedings earlier, the said finding would operate as a res judicata in respect of the very subject matter."

18. Therefore, the proceedings under Section 93 and 96 are mutually exclusive and the findings in any of the proceedings would operate as res judicata on the same subject matter, whereas in the present case such is not the situation. In the present case there are no 96 proceedings at all. Merely because the findings in either of the proceedings is treated as res judicata for the very subject matter in the other proceedings, it cannot be said that the consequences under Section 93 and the consequences under Section 96 are the same and it should meet with the same fate. The Rule 32 (1)(a) reads as under:

"he is not in default in respect of any loan taken by him for such period as is specified in the bye-laws"

Clause (f) of the Rule 32 reads as under:

"no order is made against him under sec. 93"

19. Therefore, when the legislature has consequently made provisions for not including the disqualification in a matter where the order is passed under Section 96 of the Act, this Court in exercising power under Article 227 or 226 of the Constitution of India can neither substitute the wisdom of the legislature, nor can it be said that the order under Section 93 should not be read so as to attach a permanent disqualification to a person concerned for becoming member of the Managing Committee,

which otherwise could not have been done if the proceedings under Section 96 were to be resorted to. In the present case though there is no proceedings under Section 96 of the Act, the effect of the order under Section 93 of the Act qua the disqualification cannot be deleted or nullified when the legislature has specifically intended to attach the disqualification in respect to order passed under Section 93 only and, therefore, I cannot accept the submission made by Mr.Patel that since the society can also resort to the proceedings under Section 96, the order under Section 93 of the Act should not attach the disqualification as provided under Rule 32 of the Act.

20. Reliance is placed by both the Counsel for the petitioners upon the judgement dated 25-9-2001 passed in SCA No.4782/1991, which is also of no help to the petitioners for the reasons stated hereinafter. In the said judgement at para 5, the Court has observed as under:

" I have gone through the reasonings of the Tribunal and the Inquiry Report of the I.O. After considering the same, it cannot be said that the authority has committed an error in passing the order against the petitioner. This being a petition under Article 227 of the Constitution of India, it is not open for this Court to re-appreciate the material on record and to take a different view in the matter. The findings recorded by the Tribunal are essentially the findings of fact on appreciation of material on record. Therefore, it is not possible for me to accept the submission advanced on behalf of the petitioner. However, there is neither allegation in the show cause notice, nor finding recorded that the petitioners misused the money of the Sangh with oblique motive, namely that they misappropriated the amount. Even if the allegations made against the petitioners are accepted, the same at the most, can be termed as bonafide mistake without any unjust or improper motive. It would not amount to misconduct inviting action under section 93 of the Act."

21. Therefore, in view of the same the Court ordered for clarifying that it would not attach the disqualification under Rule 32 of the Gujarat Cooperative Societies Act. In the present case for the reasons stated hereinabove, it is found that it was not a case of mistake of utilisation of the fund, but it was rather a

case of gross negligence in using the fund for a different purpose than the purpose of the society and no such prudent, elected representative or any person could have condoned the huge amount of Rs.1,45,000/-. It is also found that such conduct would attract the action under Section 93 of the Act and when the order under Section 93 of the Act is examined on merits and is found proper, merely because the amount is paid is no ground for removing the disqualification under Rule 32 of the Rules because, in my view, if such indulgence is shown it would frustrate the intention of the legislature to keep such persons out of the affairs of the society at the time of becoming members of the Managing Committee, more particularly when, on account of such persons, the society has not only suffered loss of funds, but the conduct was such that the persons should not be allowed to assume the office. Therefore, on the face of Rule 32 clause (f) and the intention of the legislature, I am of the view that the judgement passed in SCA 4782/1991 is of no help to the petitioners and the said contention also fails.

22. In view of the above discussions, I find no merit in any of the contentions raised on behalf of the petitioners and in the result, all these petitions are dismissed with the cost of Rs.2,500/- each to be paid by the respective petitioners to the State Government towards the costs of litigation. All these petitions are rejected accordingly. Rule discharged.

23. After the pronouncement of the order today, Mr.Ketan Shah for the petitioners appearing on behalf of the petitioners, requests for continuation of interim relief for some time so as to enable his client to approach before the higher forum. Considering the facts and circumstance of the case, the interim relief granted by this Court earlier and which is continued until pronouncement of the judgement shall continue to remain in operation for a period of six weeks from today.

16-8-2002 (Jayant Patel, J.)

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